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Dato' Azizan bin Abdul Rahman & Ors v Pinerains Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1916–10 OF 2019
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND SEE MEE CHUN JJCA
9 AUGUST 2021

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Legal Profession — Disqualification — Conflict of interest — Representation by counsel — Respondent applied to recuse and/or disqualify counsels from acting for appellants — Whether there was former solicitor-client between counsel and respondent — Whether counsel in possession of confidential information — Whether confidential information would adversely affect respondent and relevant to appeal

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This was an application by the respondent to recuse and/or disqualify Mr Nahendran Navaratnam ('NN') and Ms Wong Wye Wah ('WWW') from acting as counsel for the appellants. The appellants were independent directors of Apex Equity Holdings Bhd ('Apex'). The respondent was a shareholder of Apex. Mdm Lim Siew Kim ('Mdm Lim') was a director and shareholder of the respondent and Ms Chan T'Shiao ('Ms Chan') was the former director and/or shareholder of the respondent and ceased to be so by 31 August 2014. Mercury Securities Sdn Bhd ('Mercury') and JF Apex Securities Sdn Bhd ('JF Apex'), a wholly owned subsidiary of Apex, filed an originating summons ('OS 345') to seek a vesting order. The respondent applied to intervene and set aside the vesting order and also filed a counterclaim. The appellants in defending the counterclaim contended that the counterclaim was procedurally improper. However, the defence was not accepted. This appeal related to that part of the High Court judgment which held there was no procedural impropriety in relation to the filing of the counterclaim. Prior to the filing of OS 345, Apex and JF Apex filed OS 264 against the respondent, Mdm Lim, Ms Chan and 15 others seeking declarations they were aggrieved persons within the meaning of s 360(1)(d) of the Capital Markets and Services Act 2007. Ms Chan appointed NN and WWW as counsel to oppose and strike out OS 264. Hence, this application by the respondent. The grounds were that: (a) NN and WWW previously acted as counsel for Ms Chan in OS 264; (b) the facts and issues relating to OS 264 and the appeal were obviously and closely related; (c) NN and WWW were in possession of confidential information of the respondent having previously acted as counsel for Ms Chan; (d) NN and WWW were in a position of embarrassment and in conflict by acting and/or continuing to act as counsel for the appellants; and (e) NN and WWW were in breach of rules of the Legal Profession (Practice and Etiquette) Rules 1978. The issues for

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A determination were: (i) whether there was a former solicitor-client between NN, WWW and the respondent; (ii) whether NN and WWW were in possession of confidential information; and (iii) whether the confidential information would adversely affect the respondent and whether relevant to this appeal.

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Held, dismissing the application:

(1) Ms Chan was not the respondent and whatever interest and /or shareholding she had in the respondent had ceased by the time NN and
C WWW came on board as counsel for her. This was after the filing of OS 264. It could not thus be said that being counsel for Ms Chan equated to being a counsel for the respondent. There could therefore be no previous solicitor-client relationship between NN, WWW and the respondent which would give rise to a duty to preserve the confidentiality
D of information at the material time (see paras 42–43).

(2) The burden laid on the respondent who sought to disqualify the counsel to place before the court full particulars of the relevant confidential information that was disclosed. Although the table showed many exchange of emails, what was ultimately placed before the court was that
E one paragraph of the email dated 26 June 2019 which was found to be not confidential information. The respondent had not discharged its burden (see para 49).

(3) Given that the purported confidential information was limited and
F found to be not confidential, it followed that it could not possibly affect the respondent at all. On the relevance between OS 264 to the present appeal, there was none (see paras 52–53).

[Bahasa Malaysia summary

G Ini adalah permohonan responden untuk menyingkirkan dan/atau membatalkan En Nahendran Navaratnam ('NN') dan Cik Wong Wye Wah ('WWW') daripada bertindak sebagai peguam bagi perayu. Perayu adalah pengarah bebas Apex Equity Holdings Bhd ('Apex'). Responden adalah pemegang saham Apex. Puan Lim Siew Kim ('Puan Lim') ialah pengarah dan
H pemegang saham responden dan Cik Chan T'Shiao ('Cik Chan') ialah bekas pengarah dan/atau pemegang saham responden dan tidak lagi merupakan begitu pada 31 Ogos 2014. Mercury Securities Sdn Bhd ('Mercury') dan JF Apex Securities Sdn Bhd ('JF Apex'), anak syarikat milik penuh Apex, memfailkan saman pemula ('OS 345') untuk mendapatkan perintah letak hak.
I Responden memohon untuk campur tangan dan mengetepikan perintah letak hak dan juga memfailkan tuntutan balas. Perayu-perayu dalam pembelaan terhadap tuntutan balas tersebut berhujah bahawa tuntutan balas itu adalah tidak wajar secara prosedur. Bagaimanapun, pembelaan tidak diterima. Rayuan ini berkaitan dengan bahagian penghakiman Mahkamah Tinggi yang

menyatakan tiada ketidakwajaran prosedur berhubung dengan pemfailan tuntutan balas. Sebelum pemfailan OS 345, Apex dan JF Apex memfailkan OS 264 terhadap responden, Puan Lim, Cik Chan dan 15 yang lain memohon pengisytiharan bahawa mereka adalah orang yang terkilan dalam pengertian s 360(1)(d) Akta Pasaran Modal dan Perkhidmatan 2007. Cik Chan melantik NN dan WWW sebagai peguam untuk menentang dan membatalkan OS 264. Oleh itu, permohonan ini oleh responden. Alasannya ialah: (a) NN dan WWW sebelum ini bertindak sebagai peguam untuk Cik Chan dalam OS 264; (b) fakta dan isu yang berkaitan dengan OS 264 dan rayuan jelas dan berkait rapat; (c) NN dan WWW memiliki maklumat sulit responden yang pernah bertindak sebagai peguam untuk Cik Chan; (d) NN dan WWW berada dalam kedudukan serba salah dan berkonflik dengan bertindak dan/atau terus bertindak sebagai peguam bagi perayu; dan (e) NN dan WWW telah melanggar peraturan Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978. Isu-isu untuk penentuan adalah: (i) sama ada terdapat peguam-anak guam sebelum ini antara NN, WWW dan responden; (ii) sama ada NN dan WWW memiliki maklumat sulit; dan (iii) sama ada maklumat sulit tersebut akan memberi kesan buruk kepada responden dan sama ada berkaitan dengan rayuan ini.

Diputuskan, menolak permohonan:

(1) Cik Chan bukan responden dan apa sahaja kepentingan dan/atau pegangan saham yang beliau ada dalam responden telah terhenti apabila NN dan WWW menyertainya sebagai peguam untuknya. Ini adalah selepas pemfailan OS 264. Oleh itu tidak boleh dikatakan bahawa menjadi peguam bagi Cik Chan adalah sama dengan menjadi peguam bagi responden. Oleh itu, tiada hubungan peguam-anak guam sebelum ini antara NN, WWW dan responden yang akan menimbulkan kewajipan untuk memelihara kerahsiaan maklumat pada masa material (lihat perenggan 42–43).

(2) Beban yang ditanggung oleh responden yang memohon untuk membatalkan peguam untuk mengemukakan di hadapan mahkamah butir-butir penuh maklumat sulit berkaitan yang telah didedahkan. Walaupun jadual menunjukkan banyak pertukaran emel, apa yang akhirnya diletakkan di hadapan mahkamah ialah satu perenggan emel bertarikh 26 Jun 2019 yang didapati bukan maklumat sulit. Responden tidak melepaskan bebannya (lihat perenggan 49).

(3) Memandangkan maklumat sulit yang dikatakan adalah terhad dan didapati tidak sulit, ia tidak mungkin menjejaskan responden sama sekali. Mengenai perkaitan antara OS 264 dengan rayuan ini, adalah tiada (lihat perenggan 52–53).]

Cases referred to

Belan v Casey [2002] NSWSC 58, SC (refd)
Borgese v Carter & Blummer Pty Ltd t/a Carter & Blumer (No 3) [2017] NSWSC 92, SC (refd)
Harsha Rajkumar Mirpuri (Mrs) NéE Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani [2018] 5 SLR 894, HC (refd)
Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors; (Uma Devi d/o R Balakrishnan, third party) [2003] 6 MLJ 703; [2003] 4 CLJ 587, HC (refd)
MacDonald Estate v Martin [1990] 3 SCR 1235, SC (refd)
Mirza Mohamed Tariq Beg bin Mirza HH Beg v Margaret Low Saw Lui & Ors [2009] 4 MLJ 671, CA (refd)
Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd [2009] MLJU 120; [2010] 2 CLJ 1061, HC (refd)
Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222, HL (folld)

Legislation referred to

Capital Markets and Services Act 2007 s 360(1)(d)
Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, 5, 16

Appeal from: Originating Summons No WA-24NCC-345–06 of 2019 (High Court, Kuala Lumpur)

Rabindra S Nathan (Lyness Lim Wei Xeng, Kennie Ang Joo Koon and Yin-Yin with him) (Ang & Lau) for the appellant.
Wong Rhen Yen (Goik Kenwayne and Foong Kar Yee with him) (Dennis Nik & Wong) for the respondent.

See Mee Chun JCA:

INTRODUCTION

[1] Enclosure 34 is an application by the respondent to recuse/and or disqualify Mr Nahendran Navaratnam (NN) and Ms Wong Wye Wah (WWW) from acting as counsel for the appellants.

[2] We had dismissed the application and we now give our reasons.

THE CAUSE PAPERS

[3] The cause papers are as follows:

(a) the respondent's notice of motion dated 12 December 2020 (encl 34);

(b) the respondent's affidavit in support affirmed by Lim Siew Kim and Chan T'Shiao Li on 11 December 2020 (encls 35 and 36);

(c) the appellants' affidavit (No 1) affirmed by Nahendran Navaratnam on 29 December 2020 (encl 42);

(d) the appellant's affidavit (No 2) affirmed by Ang Joo Koon (Ang) on 29 December 2020 (encl 43); and

(e) the respondent's affidavit in reply (1) affirmed by Lim Siew Kim and Chan T'Shiao Li on 22 January 2021 (encl 48).

THE RELEVANT PARTIES

[4] The appellants are independent directors of Apex Equity Holdings Bhd (Apex), a public listed company and a licensed broking house.

[5] The respondent is an investment holding company. At all material time, the respondent is a shareholder of Apex with approximately 8,898,480 shares or 4.17% of the issued and paid up capital of Apex. NN is the lead counsel for the appellants and WWW his assistant.

[6] Madam Lim Siew Kim (Mdm Lim) is the director and shareholder of the respondent and mother of Ms Chan T'Shiao (Ms Chan). Ms Chan is the former director and/or shareholder of the respondent and ceased to be so by 31 August 2014. Mdm Lim and Ms Chan are mother and daughter.

THE PRESENT APPEAL

[7] On 27 June 2019 Mercury Securities Sdn Bhd (Mercury) and JF Apex Securities Sdn Bhd (JF Apex), a wholly owned subsidiary of Apex, filed Originating Summons No WA-24NCC-345–06 of 2019 (OS 345). This was to seek a vesting order to give effect to the business merger between Mercury and JF Apex and this was granted on 1 July 2019.

[8] The respondent applied to intervene and set aside the vesting order and also filed a counterclaim against Mercury, JF Apex, Apex, Alliance Investment Bank Bhd (Alliance) and the appellants. In the counterclaim, the respondent sought a declaration that the resolutions passed at the EGM of Apex on 19 June 2019 be invalidated and/or annulled and/or set aside. This was premised on the conditions precedent to the business merger agreement (BMA) not being fulfilled and remained conditional.

[9] In defending the counterclaim, it was contended by the appellants that the counterclaim was procedurally improper as the respondent was not entitled to add the appellants who are non parties to OS 345 as additional parties.

[10] On 18 September 2019 the High Court set aside the resolutions with damages against Apex and JF Apex to be assessed; and the counterclaim against Mercury and Alliance dismissed. The appellants' defence of the counterclaim being procedurally improper was not accepted. The counterclaim against the appellants was allowed but the merits were not decided and no further order was made.

[11] The present appeal relates to that part of the High Court judgment which held there was no procedural impropriety in relation to the filing of the counterclaim.

ORIGINATING SUMMONS NO WA-24NCC-264–05 OF 2019 (OS 264)

[12] Prior to the filing of OS 345, Apex and JF Apex filed OS 264 against the respondent, Mdm Lim, Ms Chan and 15 others on 17 May 2019 seeking declarations they are aggrieved persons within the meaning of s 360(1)(d) of the Capital Markets and Services Act 2007 ('the CMSA'); that the respondent, Mdm Lim, Ms Chan and the others have contravened the provisions of the CMSA and the Licensing Handbook SC-GL/LH-2007 concerning the control and takeover codes and that the respondent, Mdm Lim, Ms Chan and the others are deemed persons acting in concert (PACs).

[13] All the defendants filed a striking out action. Ms Chan, through her solicitors Messrs Dennis Nik & Wong (DNW), appointed NN and WWW as counsel to oppose and strike out OS 264. OS 264 was successfully struck out against all the defendants on 1 November 2019. Apex and JF Apex vide the appellants filed an appeal which was dismissed by the Court of Appeal on 11 September 2020. The application for leave to the Federal Court was dismissed on 26 February 2021.

APPLICATION TO DISQUALIFY

[14] It is against the above backdrop that encl 34 was filed by the respondent.

[15] The grounds are that NN and WWW previously acted as counsel for Ms Chan in OS 264; the facts and issues relating to OS 264 and the appeal are obviously and closely related; NN and WWW are in possession of confidential information of the respondent having previously acted as counsel for Ms Chan; NN and WWW are in a position of embarrassment and in conflict by acting and/or continuing to act as counsel for the appellants; and NN and WWW are in breach of rules of the Legal Profession (Practice and Etiquette) Rules 1978 ('the LPR').

CONTENTIONS OF THE RESPONDENT

[16] It was contended by the respondent that NN and WWW by acting as counsel for Ms Chan in OS 264 and now for the appellants have effectively switched camps. Such conduct is very subversive of the appearance that justice is being done.

[17] Various provisions in the LPR were referred wherein an advocate and solicitor is not to accept brief if embarrassed (r 3), if professional conduct likely to be impugned (r 4), if difficult to maintain professional independence (r 5) and not to abuse confidence reposed in him by client (r 16).

[18] It was submitted that the legal proposition to disqualify a counsel from acting for a party has been laid down by the Canadian Supreme Court in *MacDonald Estate v Martin* [1990] 3 SCR 1235. This sets down certain factors to consider namely whether there is a previous relationship sufficiently related to the matter at hand which when established raises an irrebuttable presumption that the counsel received confidential information; and the burden is on the counsel to satisfy the court that no such confidential information was imparted. The principles as aforesaid have been followed by Malaysian courts in *Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd* [2009] MLJU 120; [2010] 2 CLJ 1061 and *Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors; (Uma Devi d/o R Balakrishnan, third party)* [2003] 6 MLJ 703; [2003] 4 CLJ 587.

[19] It was next submitted the criteria in *Martin* had been met and the counsel had not discharged the burden they did not receive confidential information having advised and acted for Ms Chan. In addition, the communication and inputs from NN and WWW in relation to OS 264 were shown.

[20] There were also submissions on there being no waiver of privilege in the communications between NN's office and DNW in OS 264, the affidavits of WWW and one Ang Joo Kong in encls 42 and 43 are to be disregarded and that there was no delay in filing the notice of motion.

CONTENTIONS OF THE APPELLANTS

[21] The appellants submitted there was waiver of privilege in the communications between NN's office and DNW in OS 264. This was because the respondent in the affidavit in support referred to and exhibited several emails passing between NN's office and that of DNW. Hence the respondent

has effectively waived privilege in the other communications between NN's office and that of DNW in relation to and exhibited as evidence in NN's affidavit in reply.

[22] In relation to the law on disqualification of counsel, the same provisions of the LPR as relied on by the respondent, were referred to by the appellants.

[23] The appellants relied on *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 that the court's jurisdiction to intervene is founded on the right of the former client to the protection of his confidential information; the only duty to the former client is a continuing duty to preserve the confidentiality of information imparted during its subsistence and the former client must establish that the counsel is in possession of confidential information which is or might be relevant to the matter. These principles have been followed by the Court of Appeal in *Mirza Mohamed Tariq Beg bin Mirza HH Beg v Margaret Low Saw Lui & Ors* [2009] 4 MLJ 671.

[24] The legal test to apply would be to establish a former solicitor-client relationship; the respondent to prove that NN and WWW are in possession of confidential information relevant to this appeal and a strong case is to be made out by the respondent.

[25] With respect to the confidential information, the court would need to decide on whether the confidential information is likely to adversely affect the respondent's interest; whether there is a real or appreciable risk that the confidential information would be disclosed; and whether in recognizing the significance and importance of the special fiduciary relationship which gives rise to the duty of protection, the court's discretionary power to disqualify should be exercised.

[26] It was finally contended that there was no former solicitor-client relationship between NN or WWW and the respondent; NN or WWW are not in possession of any confidential information and no full particulars of such was placed before the court; and even if there was such confidential information, it was not relevant to the appeal and would not adversely affect the respondent's interest.

OUR DECISION

The legal principles

[27] We first refer to *Martin* cited by the respondent as the law on the disqualification of counsel where at p 139 it was stated as follows:

> In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communications. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden. The second question was whether there was a risk that the confidential information would be used to the prejudice of the client. A lawyer who had relevant confidential information could not act against his client or former client. In such a case the disqualification was automatic and no assurances or undertakings not to use the information would avail.

[28] The respondent then stated that arising from the above, the court ought to take into account the following:

(a) whether there is a previous relationship which is sufficiently related to the matter at hand;

(b) once such a previous relationship is established, there is an irrebuttable presumption that the advocate and solicitor received confidential information;

(c) the burden is on the advocate and solicitor to satisfy the court that no such confidential information was imparted;

(d) this is a difficult and heavy burden to discharge; and

(e) if the advocate and solicitor fails to discharge this burden, the recusal and/or disqualification is automatic and no assurances or undertakings not to use the confidential information would avail.

[29] Next, we refer to *Jefri Bolkiah* cited by the appellants as the law on this very same issue and at p 235 as follows:

> Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client is a continuing duty to preserve the confidentiality of information imparted during its subsistence.
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> Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish: (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of

A which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to
B these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case ...

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[30] According to the appellants, the principles from *Jefri Bolkiah* are as follows:

(a) the court's jurisdiction to intervene is founded on the right of the former client to the protection of his confidential information;

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(b) the only duty of a solicitor/counsel to the former client after the termination of the solicitor-client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence; and

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(c) the former client must establish that the solicitor/counsel is in possession of confidential information which is or might be relevant to the matter.

F **[31]** The two cases are on common ground that there must be a previous relationship between the counsel and the client and the confidential information must relate to the matter at hand. There is then a marked departure where *Martin* states that where there is such a relationship, there is an irrebuttable presumption that the counsel received confidential information and the burden lies on the counsel that such confidential information was not
G received and if the counsel fails to discharge this burden, the disqualification is automatic. Whereas *Jefri Bolkiah* requires that the former client who seeks to recuse his former counsel to establish that the counsel is in possession of confidential information the disclosure of which he has not consented to.

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[32] *Martin* is grounded on a conflict of interest situation where at p 249 it is stated:

... The *sina qua non* of the justice system is that there be an unqualified perception of its fairness in the eyes of the general public. In order to sustain that salutary
I precept, it is essential that the integrity and absolute independence of the courts and its officers be maintained in such a way as to assure a discerning public that the principle of equality before the law is not compromised.

[33] These were also referred to by the High Court in *Perbadanan*

Pembangunan Pulau Pinang at p 1065 (CLJ) and *Kayla Beverly Hills* in pp 710–711 (MLJ); pp 593–594 (CLJ).

[34] On the other hand, *Jefri Bolkiah* is grounded on the fiduciary relationship between counsel and client coming to an end with the termination of the retainer such that the counsel has no obligation to defend and advance the interests of his former client. 'The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence'. Refer to p 292.

[35] We prefer the test as laid down in *Jefri Bolkiah*. It has been adopted by an earlier Court of Appeal in *Mirza* at p 679 as follows:

> I accept the above principles of law. Two important propositions emerge. First, for the principle of confidentiality to apply warranting a court to intervene, there must first be established a relationship of solicitor and client or some other fiduciary relationship. In the absence of such a relationship, the principle does not apply. The facts of *Hardless v Hardless* AIR 1932 Allahabad 536 provide a good example as to how the principle is to be applied. In that case, the respondent to a divorce petition wrote to a counsel referring to complaints that he had against his wife and stating that he desired to take action so that he might obtain custody of the children. However, the letter did not definitely engage counsel's services. Later, the said counsel was engaged by the petitioner to act for her and the respondent husband made application to prohibit him from acting in the matter. The court dismissed the application and held as follows:
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> ... Second, it depends on the facts of each case whether confidential information was conveyed. In order to bar a solicitor or other fiduciary from acting, the applicant must place before the court full particulars of the relevant confident information that was allegedly disclosed to the solicitor or fiduciary. Mere general or vague allegations are insufficient. As was stated in *State v Lalit Mohan Nanda* AIR 1961 Orissa J:
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> > ... the onus of proving that confidential information was conveyed lies heavily upon the applicant.

[36] The rationale for *Jefri Bolkiah* premised on the existence of confidential information as opposed to the existence of a conflict of interest is a cogent one. This is based on the fact of termination of the fiduciary relationship where what survives 'is a continuing duty to preserve the confidentiality of information imparted during its subsistence'. Further public confidence in the administration of justice is maintained because it still has to be established by the former client the real risk of disclosure of the confidential information which is adverse to him.

[37] This is also the position in Australia where *Jefri Bolkiah* has been

followed. In the Supreme Court of New South Wales in *Belan v Casey* [2002] NSWSC 58 this was said:

> 17. Prince Jefri decided two basic points: (a) the basis of the claim is the fiduciary duty to maintain information as confidential; and (b) that it is sufficient if the plaintiff demonstrates that there is a real and not fanciful risk of disclosure of confidential information, though it is not necessary to show that the risk is substantial.
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> 18. Prince Jefri has been followed on almost every occasion when the present situation has arisen, except in Victoria. It is true that it is proposition (b) that has met with approval, though it is hard to see how this can be truly divorced from proposition (a).
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> 19. In Victoria, a Court of Appeal seemed to decide contrary to Prince Jefri in *McVeigh v Linen House Pty Ltd* [1999] VSCA 138, but that decision must be regarded as being per incuriam as Prince Jefri was neither cited to the Court nor referred to by it.
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> ...
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> 21. In my view, the overwhelming weight of authority is to the effect that where the application to restrain a solicitor is a former client, the sole consideration is whether there is a real risk of disclosure of confidential information and one does not delve into matters of conflict of interest or conflict of duty. In other situations this delving may well be material.
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> 22. Thus, question 2 [on what basis can be restrained from acting] must be answered that the applicant must demonstrate a real risk of breach of the duty to hold information confidential.

[38] This same point was reiterated in *Borgese v Carter & Blummer Pty Ltd t/a Carter & Blumer (No 3)* [2017] NSWSC 92, paras 50–53.

[39] A similar position can be found in Singapore where its High Court in *Harsha Rajkumar Mirpuri (Mrs) NéE Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894, p 908 stated that it was prepared to accept that the *Bolkiah* test should govern a former client's application to restrain a law firm from acting on the grounds of protecting his confidentiality.

[40] To conclude on this note, we reiterate that the legal principles in *Jefri Bolkiah* would apply to the issue of disqualification of counsel. These principles are as follows:

(a) there must first be established a former solicitor-client or some fiduciary relationship between NN, WWW and the respondent;

(b) the respondent must prove that NN and WWW are in possession of the confidential information which is relevant to the present appeal. The

respondent must place before the court full particulars of the relevant confidential information that was allegedly disclosed to NN and WWW; and

(c) a strong case must be made out by the respondent to disqualify NN and WWW from acting as counsel for the appellants.

The applicable principles

Whether former solicitor-client relationship between NN, WWW and the respondent

[41] *Mirza* which applied *Jefri Bolkiah* stated at p 679 that 'for the principle of confidentiality to apply warranting a court to intervene, there must first be established a relationship of solicitor and client or some other fiduciary relationship. In the absence of such a relationship, the principle does not apply'.

[42] Here it is not disputed that NN and WWW were the counsel for Ms Chan in the matter of the striking out application in OS 264 and that Ms Chan is a former director and/or shareholder of the respondent having ceased to act as such by 31 August 2014. It will be obvious that Ms Chan is not the respondent and whatever interest and/or shareholding she had in the respondent had ceased by the time NN and WWW came on board as counsel for her. This was after the filing of OS 264.

[43] It cannot thus be said that being counsel for Ms Chan equates to being counsel for the respondent. There can therefore be no previous solicitor-client relationship between NN, WWW and the respondent which would give rise to a duty to preserve the confidentiality of information at the material time.

Whether in possession of confidential information

[44] If we are wrong on the above and there was indeed a previous relationship, we consider if the counsel were in possession of confidential information or were imparted such information.

[45] The respondent had produced a table in para 63 (pp 27 and 28) of its written submission in encl 56. These were email correspondence between the office of DNW and that of NN's office. During the hearing of the application on 16 April 2021, the respondent's counsel when asked which of the emails constituted confidential information, referred specifically to encl 36/429 and para 3 of the email. This email was from WWW to one Ms Sharon from DNW dated 26 June 2019. In the respondent's table this email reference is exh NN1, encl 42. This email states as follows:

A 3. Details as to when D4 ceased to be shareholder of D14 and D15. When she ceased to be director of D1, D12, D13 and D14.

D4 here refers to Ms Chan.

B **[46]** NN in para 10 of his affidavit in encl 42 stated that the details as sought were provided to his office and was obtained by DNW from a public source namely Companies Commission of Malaysia (CCM).

C **[47]** This was not disputed by the respondent where in para 11 of the affidavit in reply was stated that 'paras 6–13 are not disputed. In fact, they go to show the great detail of work and privileged discussions had taken place between my solicitors and NN and WWW as counsel'.

D **[48]** There was certainly nothing confidential about the information in question, which in any event came from the CCM, a public source.

E **[49]** The burden lies on the respondent who seeks to disqualify the counsel to place before this court full particulars of the relevant confidential information that was disclosed. Although the table showed many exchange of emails, what was ultimately placed before us was that one paragraph of the email dated 26 June 2019 which we found to be not confidential information. The respondent has not discharged its burden.

F **[50]** We also say that if a conflict situation test was applicable, there would be no conflict or embarrassment given that the information was found to be not confidential.

G **[51]** We find it not necessary to deal with the issue raised by the appellants on waiver of privilege by the respondent as the respondent was only relying on one particular paragraph of a particular email.

Whether confidential information would adversely affect the respondent and whether relevant to this appeal

H

[52] Given that the purported confidential information was limited and as earlier found to be not confidential, it follows that it cannot possibly affect the respondent at all.

I **[53]** On the relevance between OS 264 to this appeal, we are of the considered view there is none. This is due to the appeal being on a very narrow point as to whether the respondent as defendant in OS 345 could commence a separate claim in the same OS against new parties namely the appellants or whether that is a procedure permissible in a writ action. This thus deals with

whether the manner in which the counterclaim was brought before the High Court was procedurally correct. We are not dealing with the merits of the counterclaim, as it were.

The LPR

[54] Various provisions in the LPR were referred wherein an advocate and solicitor is not to accept brief if embarrassed (r 3), if professional conduct likely to be impugned (r 4), if difficult to maintain professional independence (r 5) and not to abuse confidence reposed in him by client (r 16). We find there had been no breach of the LPR by NN and WWW for the reasons given above.

NN's affidavit in reply (encl 42) and Ang's (encl 43) to be disregarded

[55] The objection to both affidavits were that it involved contentious and disputed facts and the advocates in question must be authorised by the litigants/appellants.

[56] Insofar as Ang is concerned, he was deposing on the fact of delay by the respondent in filing the application. We find it not necessary to deal with delay given that there was no confidential information, to begin with.

[57] This being an application to disqualify, NN being the counsel in question is well placed to affirm the affidavit in reply. It was stated the affidavit was deposed to respond and/or oppose the respondent's affidavit and that the facts deposed were within his personal knowledge and/or derived from relevant cause papers and/or documents to which he has access. We find no reason to disregard NN's affidavit in reply.

CONCLUSION

[58] For the above reasons, the application in to disqualify NN and WWW from acting as counsel for the appellants was dismissed with costs of RM10,000 subject to allocatur.

Application dismissed.

Reported by Ahmad Ismail Illman Mohd Razali